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September 10, 2004

RECEIVED

SEP 10 2004

Federal Communications Commission
Office of Secretary

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

**Re: Broadband PCS Spectrum Auction Scheduled for January 12, 2005,
Comment Sought on Reserve Prices Or Minimum Opening Bids And Other
Auction Procedures, *Public Notice* DA 04-1639**

**Petition for Rulemaking or, Alternatively, a Waiver of the
Entrepreneur Eligibility Restrictions on C Block Licenses in the
Broadband Personal Communications Services, RM-11019**

**Petition for Amendment of Part 1 of the Commission's Rules to
Include a Personal Net Worth Limitation for Competitive Bidding Small
Business Preference Eligibility, RM-10956**

Dear Ms. Dortch:

On behalf of the Minority Media and Telecommunications Council ("MMTC") and Council Tree Communications, Inc. ("Council Tree"), and pursuant to Section 1.1206 of the Commission's rules, this is to notify you of an *ex parte* meeting held in connection with the above-captioned proceedings.

On September 9, 2004, David Honig, Executive Director of MMTC, Michele Farquhar, Counsel to Council Tree, and the undersigned met with Jennifer Manner, Senior Counsel to Commissioner Abernathy. In the meeting the representatives of MMTC and Council Tree reiterated their support, as evidenced by their pleadings in these proceedings, for the retention in Auction 58 of the Commission's Designated Entity ("DE") rules, including the Commission's current C-Block eligibility rules.

During the meeting, the representatives of MMTC and Council Tree noted that the C-Block eligibility restrictions were originally created to satisfy sections 309(j) and 257 of the Communications Act, 1/ provisions that require the Commission to create meaningful

Ms. Marlene H. Dortch

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opportunities for small, minority-owned and women-owned businesses to acquire the spectrum needed to provide wireless services. When promulgating the rules the Commission indicated that a broadband PCS spectrum set-aside was essential to satisfying its statutory obligations. ^{2/}

The representatives of MMTC and Council Tree also noted that the Commission's August 2000 decision to modify the C-Block rules ^{3/} eliminated more than half of the C-Block spectrum set-aside and that a further erosion of the C-Block spectrum set-aside would make it impossible for the Commission to satisfy its statutory obligations.

Finally, the representatives of MMTC and Council Tree indicated that any proceeding to modify the existing C-Block eligibility rules would unnecessarily delay Auction 58 and introduce a level of uncertainty into the market place that would impair significantly the ability of small, minority-owned and women-owned businesses to secure Auction 58 financing.

The attachment presented below, which was prepared by Council Tree, was distributed at the meeting.

An original and one copy of this letter are being submitted for inclusion in the proceeding record.

Sincerely,



Ari Q. Fitzgerald
Counsel for Minority and Media
Telecommunications Council

AQF/bgg
Enclosures

cc: Jennifer Manner

^{2/} Implementation of Section 309(j) of the Communication Act – Competitive Bidding, *Fifth Memorandum Opinion & Order*, 10 FCC Rcd 403, 414-15 ¶16 (1994).

^{3/} See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Sixth Report & Order and Order on Reconsideration*, 15 FCC Rcd 16266 (2000).

**Preserving Auction No. 58 Rules
to Create Meaningful Opportunities for
Smaller Businesses, New Entrants and Minority / Women Owned Businesses**

FCC Auction No. 58

Public Notice DA 04-1639 (Report No. AUC-03-58-A)



Council Tree Communications

September 1, 2004

Introduction

We thank the Commission for their thoughtful approach and attentiveness to this important matter for small businesses and new entrants and minority / women-owned businesses

- ▶ **The Commission must stay the course on Auction No. 58, with no auction delay**
- ▶ **Any further weakening of the DE rules / Closed licenses denies broadband PCS entry opportunities for:**
 - Small businesses
 - New entrants
 - Minority and women-owned businesses
- ▶ **CTIA should properly address its concerns to Congress – not the Commission – which is diligently implementing laws passed by Congress**
- ▶ **The Commission must preserve the integrity of the DE Program – entrusted to it by Congress – and implement a High Net Worth Test**



No Basis for DE Rule Changes

- ▶ The Commission is enforcing a painstaking compromise made in 2000:

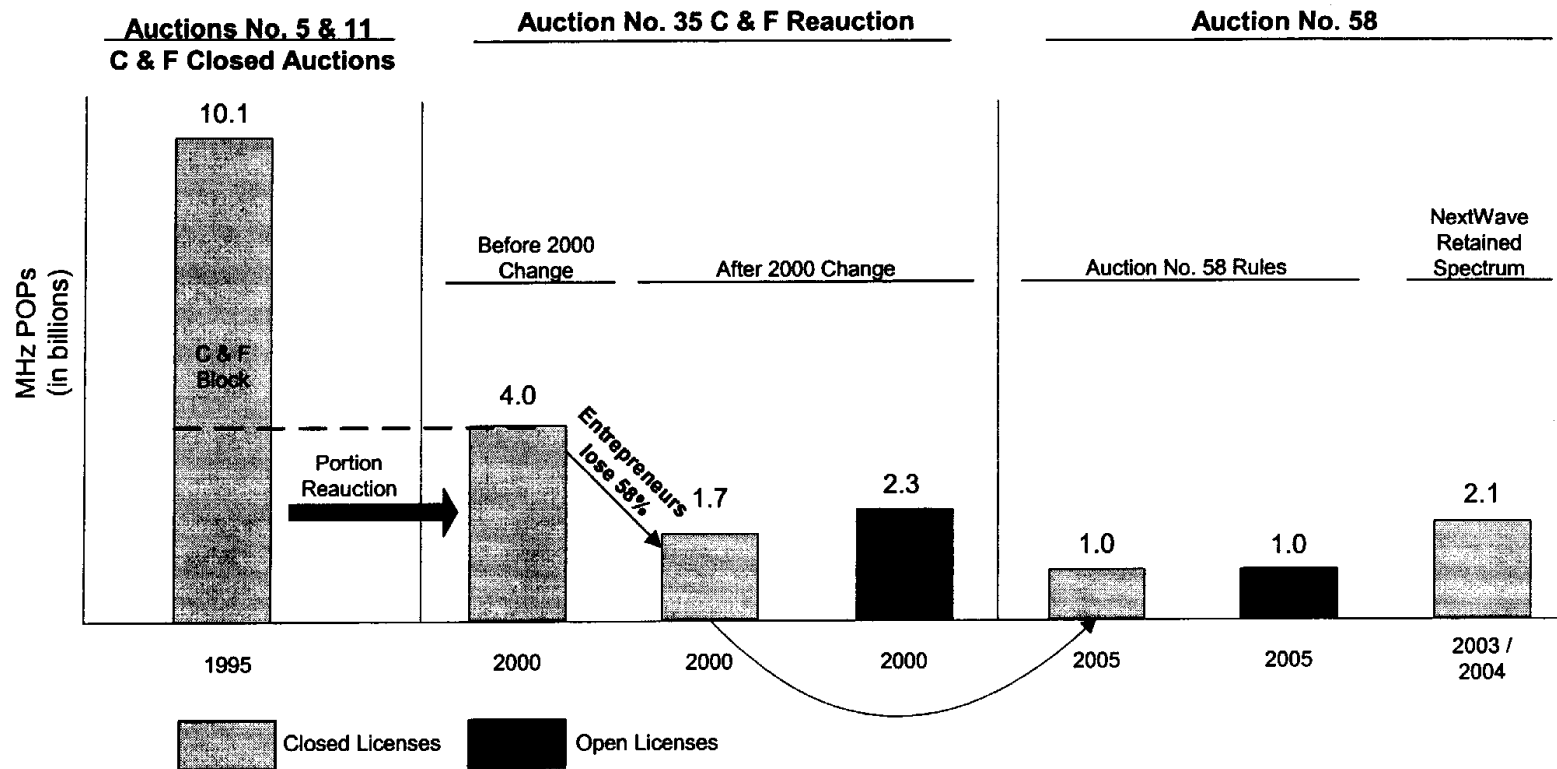
The Auction No. 35 rules “*will apply to any subsequent auctions of C or F block licenses, including any spectrum made available or reclaimed from bankruptcy proceedings in the future*”

- ▶ Any deviation from this position sends Auction No. 58 into a breakdown / substantial delay



Erosion of Entrepreneurs' Closed Spectrum in 2000

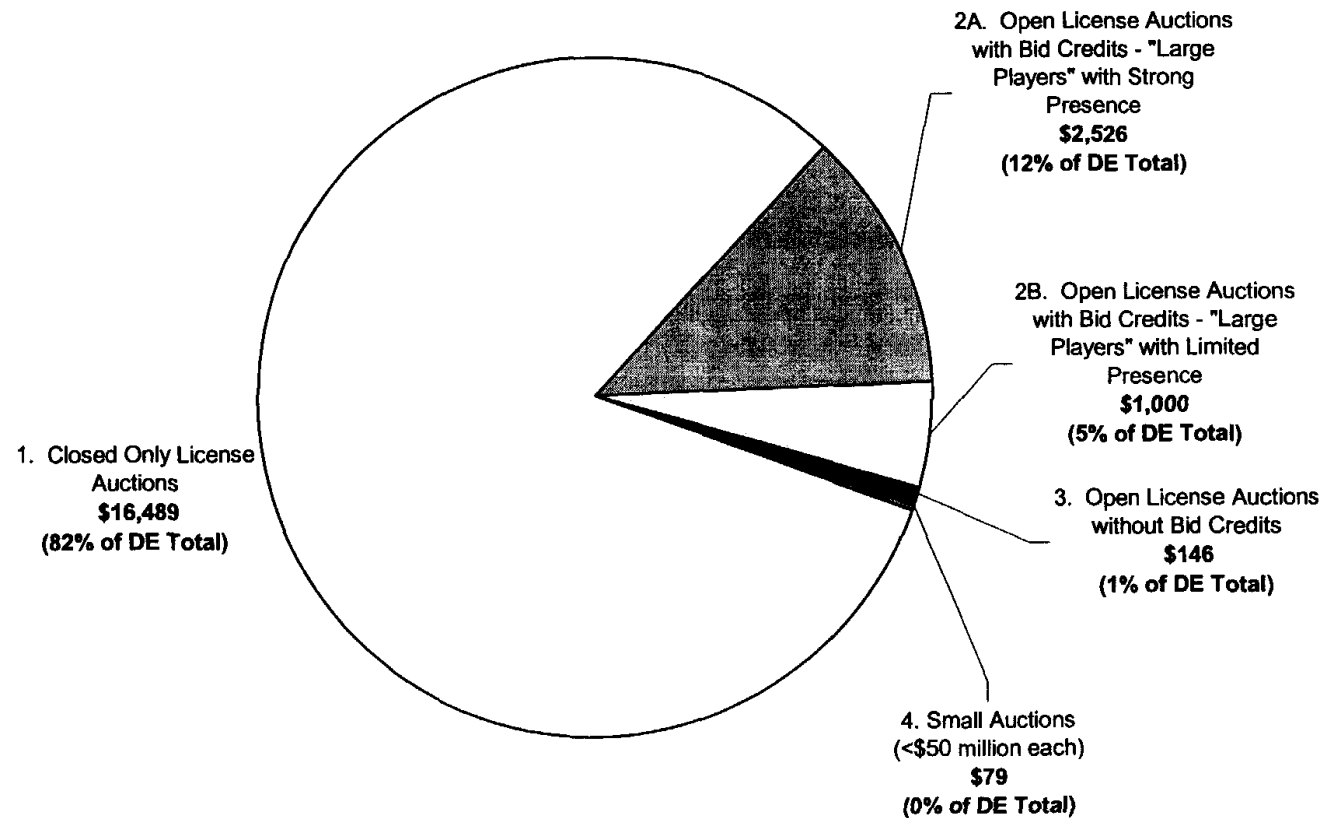
In the 2000 compromise for Auction No. 35, the Closed Entrepreneurs' Block gave up 58% of the 2000 Closed licenses re-auctioned (converted to Open)



Closed Licenses Critical to DE Success

Closed licenses account for 82% of the dollar value total DE licenses – clearly the single and critical key to small business and new entrant participation in auctions

Total DE Licenses Won at FCC Auctions By Dollar Value (\$ millions)
\$20.2 Billion of Total DE Licenses



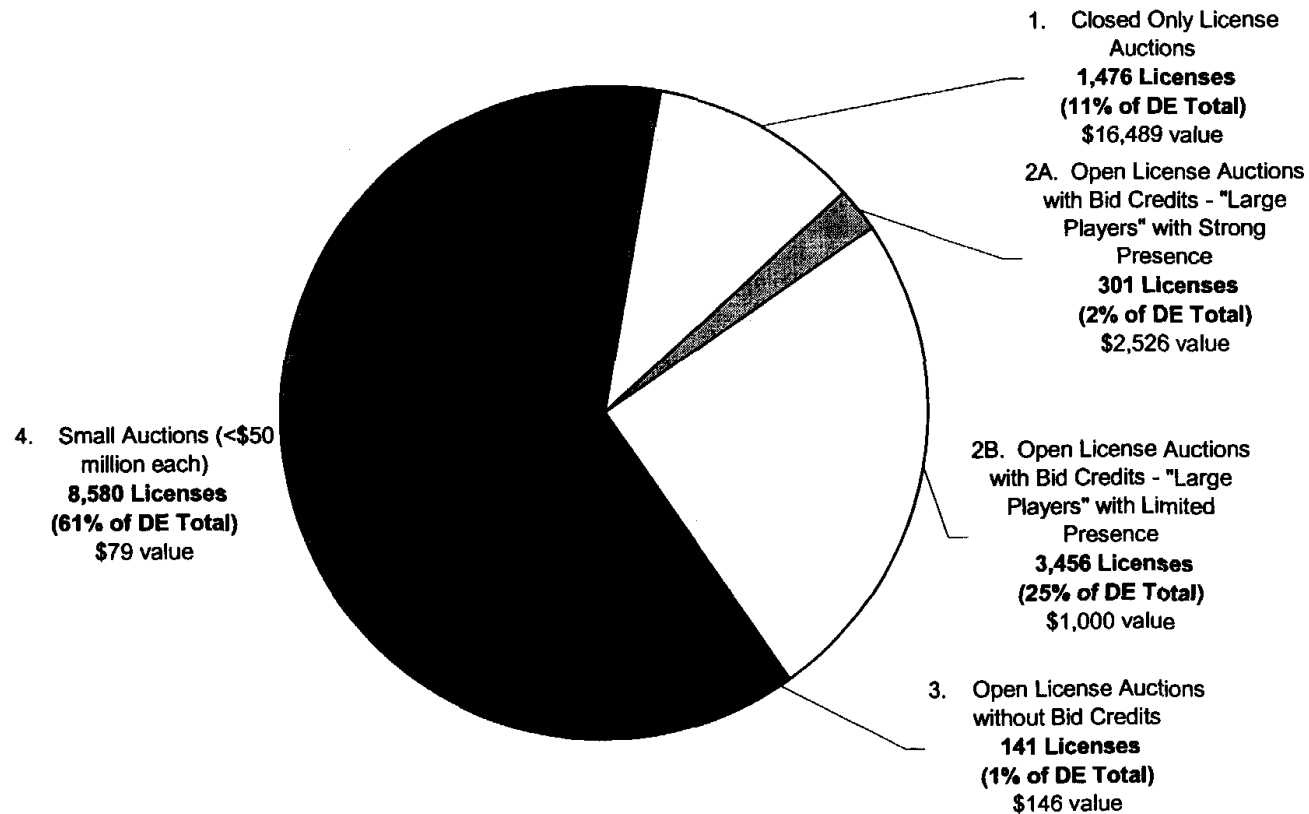
Note:
Please see appendix for convention details



Closed Licenses Critical to DE Success (cont'd)

CTIA inaccurately portrays DE "success" from the large number of DE licenses won without Closed licenses, implying bid credit effectiveness – the truth is that most of those licenses are of extremely low economic and strategic value

Total DE Licenses Won at FCC Auctions by Number of Licenses
13,954 Total DE Licenses

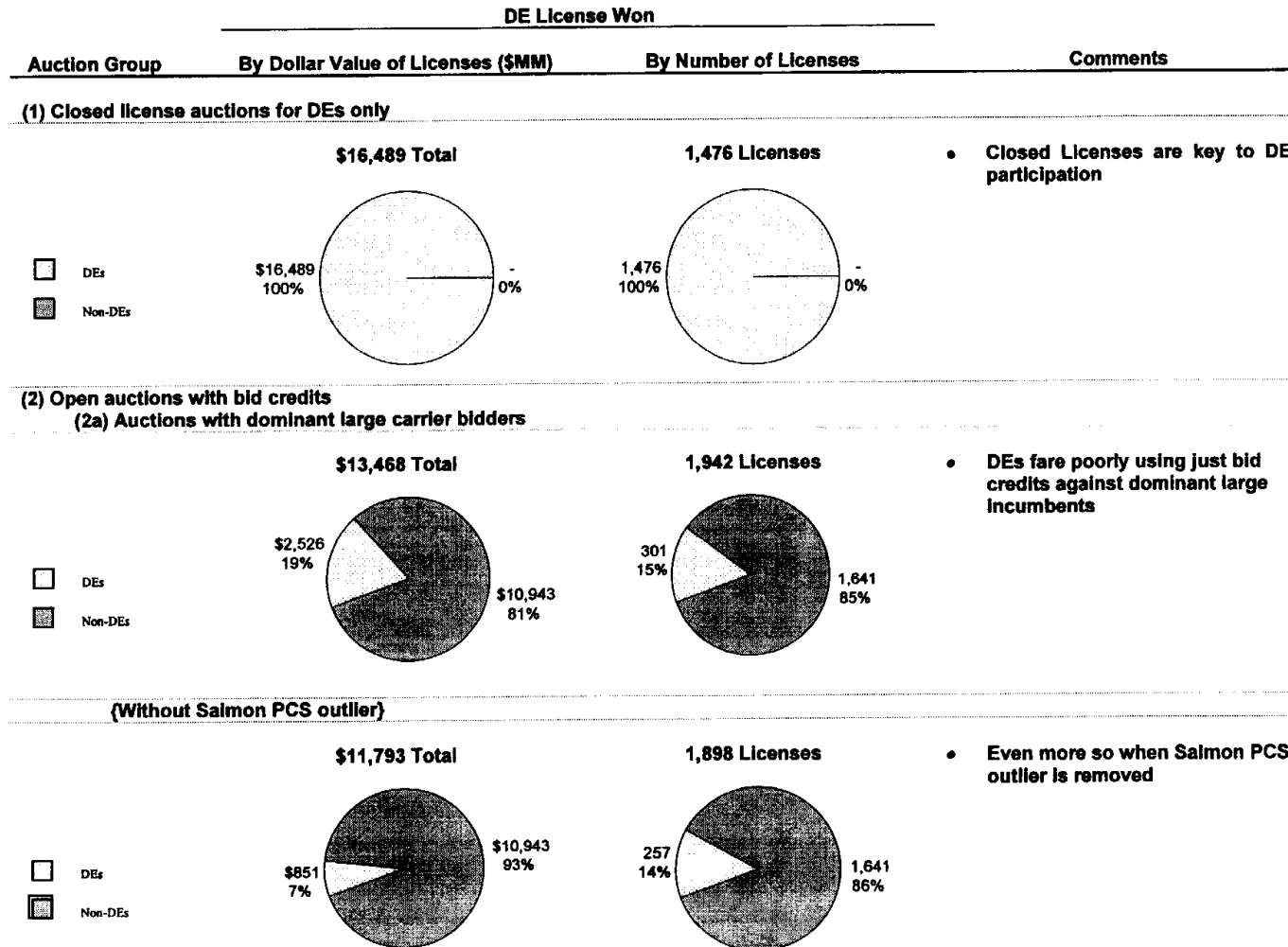


Note:
Please see appendix for convention details



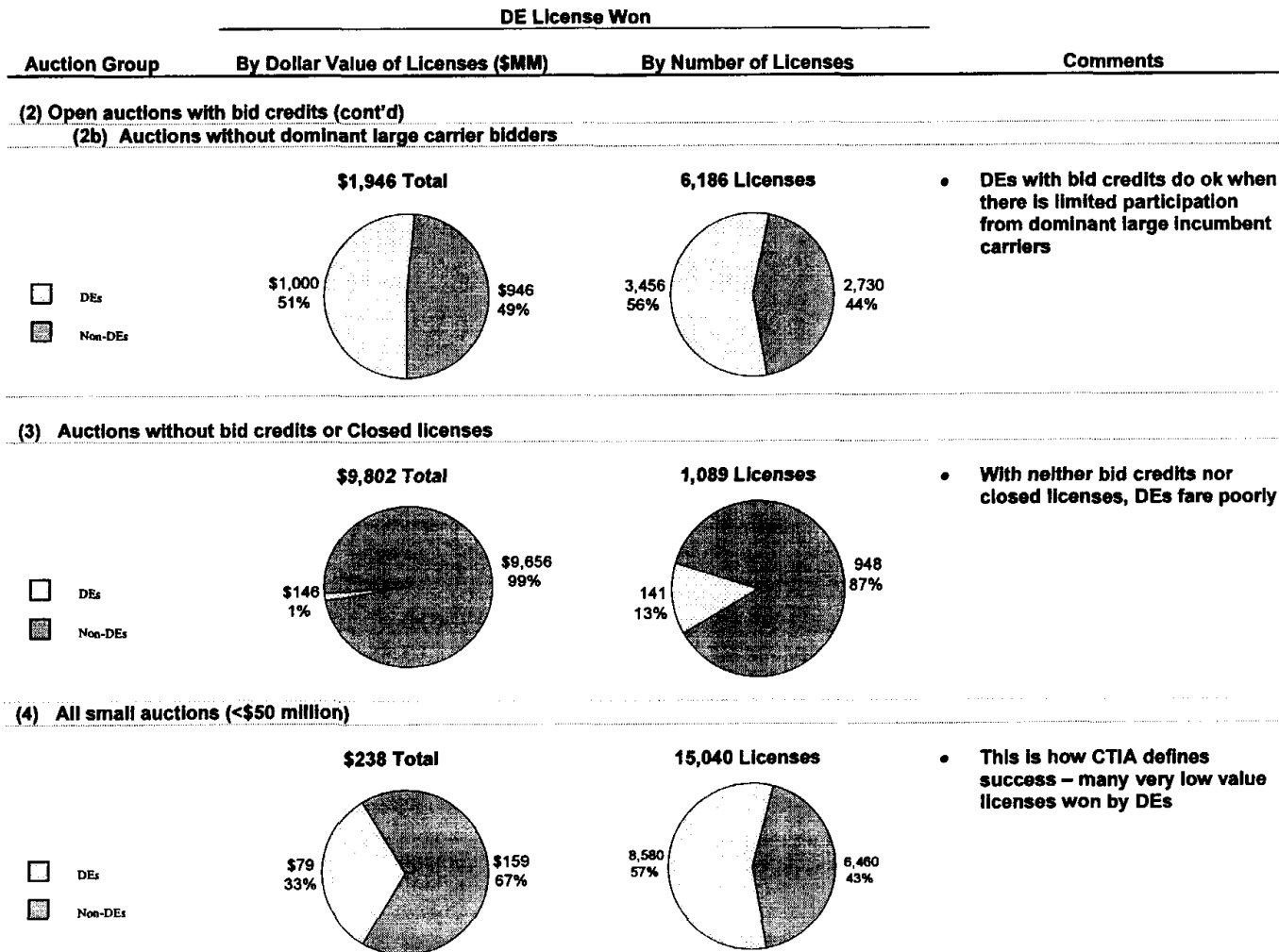
Closed Licenses Critical to DE Success (cont'd)

Closed auctions, not bid credits, are clearly the key to meaningful DE participation



Closed Licenses Critical to DE Success (cont'd)

DEs do OK with bid credits alone in auctions not marked by dominant large incumbent carrier participation



Viable Small Business Program Needed Now More than Ever

- ▶ **Industry consolidation cuts against small business / new entrants**
 - Underscores need for Entrepreneurs' Block Closed licenses
 - And supportive small business rules

- ▶ **Minority ownership in communications languishes – at near zero**
 - As the Commission's own Diversity Advisory Committee has recognized
 - While minority population is fastest growing in the U.S.

- ▶ **The DE Program is the only effective tool the Commission has**
 - To promote small business and new entrants
 - To enhance diversity of ownership by minorities and women
 - To fulfill the Commission's Congressional mandate thereto

- ▶ **CTIA's remedy is to go to Congress, not the Commission**
 - CTIA altogether ignores Congress's legal mandate to the Commission
 - To promote small and minority / women-owned business in spectrum auctions
 - Commission has long strived to fairly balance all interests



Response to CTIA Points

- ▶ *CTIA cites “changed circumstances” (increased need for spectrum) as the basis for eliminating / reducing Entrepreneur Block Closed licenses*
 - **The spectrum shortage affects small business even more**
 - **Shows why meaningful DE rules are more important today than ever**

- ▶ *DEs “take” critical spectrum from the big carriers who really need it*
 - **Congress gave their imprimatur**
 - **Small business and new entrants vital to innovation and competition**
 - Metro PCS, Leap Wireless, Cook Inlet, Tritel PCS others
 - **Deep-pocketed major carriers have alternatives**
 - Open market acquisitions (Qwest, Nextwave, etc.) and swaps (Nextel)
 - **This spectrum is a drop-in-the-bucket relative to incumbent holdings**

- ▶ *DEs do just fine with Open licenses / don’t need Closed*
 - **Patently untrue – 82% of DE spectrum value from Closed auctions**
 - **DEs with bid credits DO NOT win in major broadband PCS auctions as the Commission has concluded in prior orders and the data shows**
 - **See data in Appendix 2**



Response to CTIA Points (Cont'd)

- ▶ *DEs are flippers – no company left in aftermath*
 - **Cook Inlet (Voicestream), Metro PCS, Tritel many other success stories**
 - **“Flippers” would also include nearly all non-DE wireless carriers**
 - Craig McCaw, Voicestream, AT&T Wireless, GTE, NYNEX, AirTouch, USWest, Ameritech and numerous others
- ▶ *DEs are failures*
 - **Original C-block indeed flawed with well-intentioned installment loans**
 - The root of well-documented DE failures
 - Not repeated thereafter
 - Don't throw the baby out with the bathwater, as CTIA asks
 - **Success stories far overshadow failures**
 - Metro PCS, Tritel PCS, Cook Inlet (Voicestream) and many others
- ▶ *No viable business plans for DEs for 10 MHz of stranded spectrum*
 - **DEs are innovators, accustomed to developing new approaches**
 - **Emerging niche markets and new technology applications**
 - 3G offers a multitude of possibilities
 - **Incumbents have never “owned” the blueprints for success**



Response to CTIA Points (Cont'd)

- ▶ *DE Program broken, even Council Tree agrees (Personal Net Worth Test)*
 - **The Program is far from broken – it simply requires regular fine-tuning**

- ▶ *Closed licenses unnecessary because NextWave built-out the licenses*
 - **Commission already took this into consideration**
 - **Technocrat's argument – Commission is already on the record as having taken off the table**



Implement Personal Net Worth Test

The Commission should implement a Personal Net Worth Test for DEs

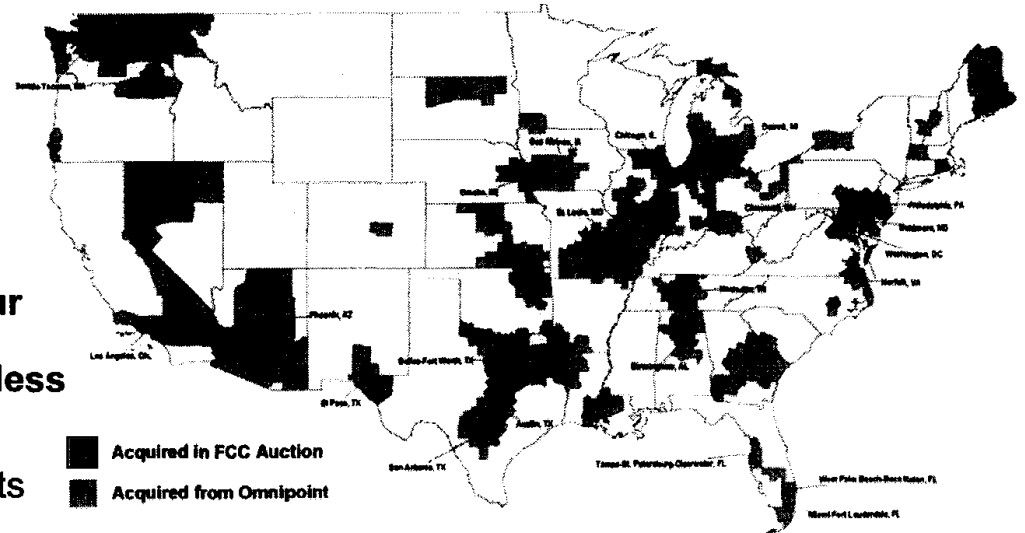
- ▶ **The DE Program needs fine-tuning – loophole allows wealthy individuals to slip-in as DEs**
 - Wealthy individuals discovered they slip through the FCC screen if they do not own a sizeable company
 - Because the FCC tests business size, not personal wealth, for eligibility
- ▶ **Creates an unfair barrier for small businesses**
 - Squeezes out legitimate small business participation
 - Will cause an uproar of the kind that killed the tax certificate program
- ▶ **The solution: implement a Personal Net Worth Test**
 - Adopt the SBA's personal net worth test to test DE eligibility
 - For large auctions, calibrate at \$3 million (excluding house & small business)
- ▶ **Screen out those wealthy individuals masquerading as DEs**



Appendix 1: Entrepreneur Success Stories – Cook Inlet

Cook Inlet exemplifies success in creating a new national carrier with its participation in the development of Voicestream – now the 5th largest carrier

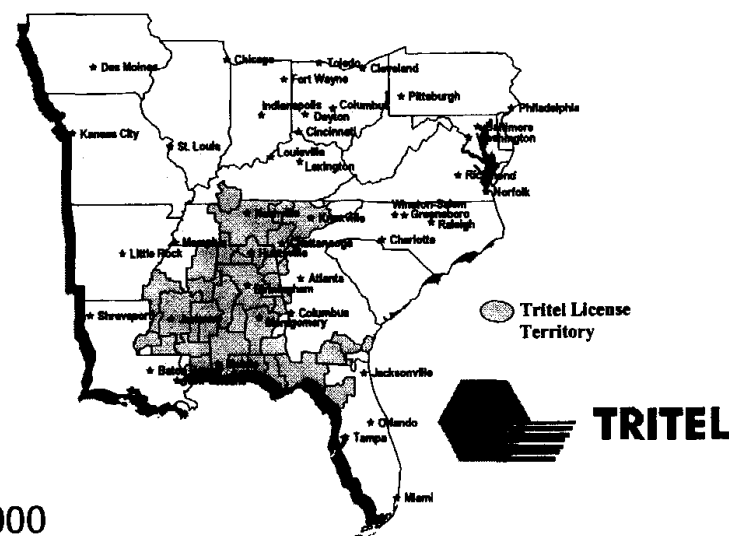
- ▶ **Cook Inlet wireless buildup**
 - Acquired over 100 million PCS POPs
 - Closed Entrepreneur auctions
 - Enormous footprint (see map)
- ▶ **Largest minority-owned Entrepreneur**
- ▶ **Strategic venture with Western Wireless**
 - Small cellular carrier at the time
 - Early buildout of numerous markets
- ▶ **Built Voicestream into national carrier**
- ▶ **Excellent example of Entrepreneurs building vibrant industry competitors**
 - Despite incumbent carriers arguments that there was no room for new entrants
 - Consumers are the beneficiaries today
- ▶ **T-Mobile would not be here today without Cook Inlet and the DE program**
 - Ironical that they and others now petition against the program



Appendix 1: Entrepreneur Success Stories – Tritel, Inc.

Tritel exemplifies success in bringing competitive PCS offerings to overlooked rural service areas

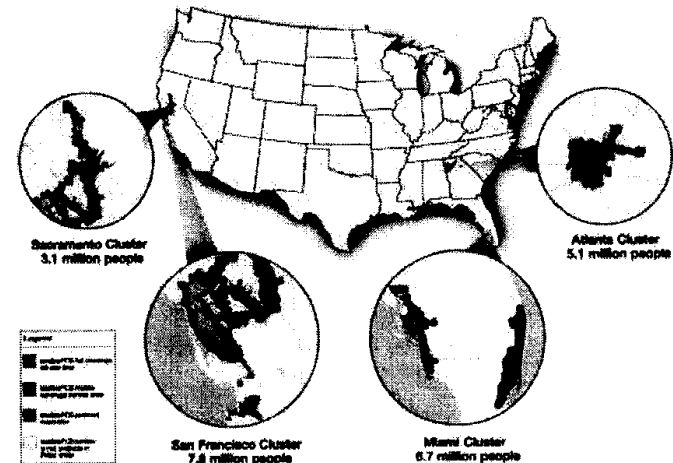
- ▶ **Acquired substantial Entrepreneur Block Closed licenses**
 - Won 10.5 million POPs
 - C & F block auctions
 - \$107 million in net bids
- ▶ **Affiliation agreement with AT&T Wireless**
 - AT&T Wireless also contributed licenses
 - Very sizeable footprint (see map)
- ▶ **Aggressively built-out these markets**
- ▶ **Success in raising \$1.2+ billion of capital**
 - Private equity, bank debt, high yield and IPO
 - \$2.5 billion merger with Telecorp, another DE, in 2000
- ▶ **Created a highly competitive venture**
 - Provides real competition to incumbents, particularly in rural areas



Appendix 1: Entrepreneur Success Stories — MetroPCS

MetroPCS's exemplifies new entrant innovation – bringing new services and competition to entrenched incumbents

- ▶ **Acquired substantial Closed licenses**
 - Won 17.9 million POPs
 - C & F Entrepreneur Block auctions
 - \$1.1 billion in net bids
- ▶ **Engineered “wireless local loop” plan**
 - Highly innovative offerings
 - Localized plan with big minute buckets
- ▶ **Aggressively built-out these markets**
 - Substantial presence now in 4 clusters
- ▶ **Created a major competitor to incumbents**
 - Novel approach serves a significant consumer need
- ▶ **Raised over \$600 of financing, navigating through a restructuring**
 - \$250 million IPO pending



Appendix 2: DE Participation in Auctions

Data for 50 FCC Auctions shows that Closed licenses are critical to DE success – refuting CTIA’s principal claim that bid credits alone are sufficient for DE success

Entrepreneurs’ Spectrum Won for 50 Auctions – by \$ Amount

Auction Grouping for Auctions > \$50 Million	DEs	Total	DE %	Key Conclusions
	<i>(\$ in billions)</i>			
(1) Entrepreneur Closed license auctions	\$16.5	\$16.5	100%	• DEs win most spectrum at Closed auctions
(2) Open auctions with bid credits:				
(2a) Auctions with dominant large carrier bidders	2.5	13.5	19%	• DEs armed only with bid credits fare poorly in open auctions with dominant large carrier incumbents
{without Salmon PCS outlier}	{0.9}	{13.5}	{6%}	
(2b) Auctions without dominant large carrier bidders	1.0	1.9	51%	• DEs with bid credits do OK in auctions without dominant large carrier incumbents
(3) Auctions with neither bid credits nor Closed licenses	0.1	9.8	1%	• DEs fail outright with neither bid credits nor Closed licenses
(4) All small auctions (<\$50 million)	0.1	0.2	33%	
Total 50⁽⁵⁾ wireless auctions	\$20.2	\$42.0	48%	

Notes

(1) 5 Auctions: 5, 10, 11 (F block only), 22 and 35 (Closed only)

(2a) 6 Auctions: 1, 3, 16, 33, 34 and 35 (Open only)

Dominant bidders defined as one or more of the large national incumbent carriers who together won 25% or more in given auction

(2b) 9 Auctions: 2, 6, 7, 17, 25, 30, 44, 49, 53

(3) 5 Auctions: 4, 8, 9, 11 (D&E Block), 15

(4) 28 Auctions: all auctions below \$50 million

(5) Data excludes recent auctions: 52 and 54



Appendix 2: DE Participation in Auctions (Cont'd)

CTIA claims DE success based on many DE licenses won – a misleading measure that focuses on many small, low value licenses, not valuable PCS licenses

Entrepreneurs' Spectrum Won for 50 Auctions – by No. of Licenses

Auction Groupings for Auctions > \$50 Million	Wireless Licenses Won			Avg. License Value (\$ millions)		Key Conclusions
	DEs	Total	DE %	DE	Non-DE	
(1) Entrepreneur Closed license auctions	1,476	1,476	100%	\$11.2	\$0.0	• DEs win many valuable licenses with Closed auctions
(2) Open auctions with bid credits:						
(2a) Auctions with dominant large carrier bidders	301	1,942	15%	8.4	6.7	• DEs win few valuable licenses with bid credits alone against dominant large incumbents
{Without Salmon PCS outlier}	{257}	{1,942}	{13%}	{3.3}	{6.7}	
(2b) Auctions without dominant large carrier bidders	3,456	6,186	56%	0.3	0.3	• DEs with bid credits win many lower value licenses without dominant large incumbents
(3) Auctions with neither bid credits nor Closed licenses	141	1,089	13%	1.0	10.2	• With neither bid credits nor Closed licenses, DEs fare poorly, winning very few / low value licenses
(4) All small auctions (<\$50 million)	8,580	15,040	57%	0.0	0.0	• This is how CTIA defines DE success – many very low value licenses won by DEs
Total 50 ⁽⁵⁾ wireless auctions	13,954	25,733	54%			

Notes

(1) 5 Auctions: 5, 10, 11 (F block only), 22 and 35 (Closed only)

(2a) 6 Auctions: 1, 3, 16, 33, 34 and 35 (Open only)

Dominant bidders defined as one or more of the large national incumbent carriers who together won 25% or more in given auction

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